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COMMENT

SPYING AND SLANDERING: AN ABSOLUTE PRIVILEGE FOR THE CIA AGENT?

When 007 plinks an enemy with a well-directed projectile from his trusty Walther PPK .32,[1] aficionados give no thought to his possible legal liability; we are all aware that Bond is licensed to kill.[2] In the real world, however, intelligence agents often strike not with guns but with words—allegations that destroy reputations, families, careers. And the question of their responsibility before the law is not nearly so settled as it is in the Fleming phantasmagoria. The recent case of *Heine v. Raus*[3] presents one of the perplexing legal issues raised by the activities of undercover agents. After a CIA secret agent is sued because of a defamatory utterance, may he reveal his identity and invoke the absolute privilege[4] conferred upon executive officials by the Supreme Court's decision in *Barr v. Matteo*?[5]

I. Heine v. Raus

At three meetings of the Legion of Estonian Liberation in 1963 and 1964, Juri Raus, the Legion's National Commander, stated that Eerik Heine was a "Communist" and a "KGB agent."[6] Heine, a Canadian citizen, was an Estonian *emigré* who earned part of his livelihood by exhibiting an anti-Communist film. In November 1964, he instituted a slander action against

1. *See* I. Fleming, Goldfinger 29 (1959). Until 1958, 007 carried a Beretta .25, *see* I. Fleming, Live and Let Die 21 (1954), but this was replaced by the Walther and a Smith & Wesson .38. *See* I. Fleming, Doctor No, at 25-29 (1958).

2. *See* I. Fleming, Doctor No, at 25 (1958). *But see* I. Fleming, You Only Live Twice 24-29 (1964).

3. 261 F. Supp. 570 (D. Md. 1966), *appeal docketed*, No. 11,195, 4th Cir., March 27, 1967.

4. "Absolute privilege" is a doctrine of the law of libel and slander which has been applied to other tortious conduct by executive officers. Under it, a defendant cannot be held liable for his acts regardless of his motive or the reasonableness of his conduct. *See generally* W. Prosser, Torts § 109 (3d ed. 1964). The doctrine might more properly be termed absolute "immunity" from suit, *see* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44, 47 (1960), but common parlance uses the term "privilege," and this Comment will follow that terminology.

5. 360 U.S. 564 (1959).

6. The "KGB" is the Soviet Secret Police. According to the complaint, the three occasions were: (1) at a special meeting of the Board of the Legion of Estonian Liberation, Inc., in New York on November 9, 1963; (2) at an Estonian gathering at Laurel Acres, Pasadena, Maryland, on July 4, 1964, where defendant made the statements only to one August Kuklane; and (3) at an Estonian gathering in Baltimore, Maryland, on September 4, 1964, where the statements were again made to Mr. Kuklane. Joint Appendix at 20-21, Heine v. Raus, *appeal docketed*, No. 11,195, 4th Cir., March 27, 1967. Mr. Kuklane has been identified in a *New York Times* report as a Baltimore contractor who is the Maryland commander of the Estonian Legion. *See* N.Y. Times, April 22, 1966, at 18, col. 4.

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Raus, alleging that the latter's statements had damaged his reputation as an anti-Communist crusader.[7]

Defendant Raus' initial answer asserted a qualified privilege, apparently grounded on his prerogatives as National Commander of the Legion;[8] trial preparations proceeded on that basis. In January 1966, one year after this answer, Raus amended the pleading to claim an absolute privilege and moved for summary judgment. He revealed that the defamatory remarks in question were uttered in his capacity as a CIA agent.[9] An accompanying affidavit was submitted by Richard Helms, then Deputy Director of the Central Intelligence Agency. Helms explained that Raus was in fact an agent, and that the alleged defamation occurred while the defendant was acting within the scope of his employment with the CIA. Indeed, Raus had been "instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's foreign intelligence sources."[10] A supplementary affidavit further explained that Raus' function had been "to warn members of Estonian *emigré* groups that Eerik Heine was a dispatched Soviet intelligence operative. . . ."[11]

Plaintiff Heine's problems then mushroomed. When additional information was sought concerning the defendant's employment with the CIA and the scope of his duties, Admiral W. F. Raborn, then Director of the CIA, invoked the evidentiary privilege against revealing state secrets.[12] He asserted that further revelations about defendant's CIA contacts would endanger national security; hence, the court would have to accept the Agency's word that Raus was an employee acting within proper bounds.[13] When Heine's

7. Plaintiff alleged that he had been a prisoner in Russian camps and had served as a guerilla fighter while he was in Estonia, from the time of the Soviet occupation of Estonia in 1940 until he was sentenced to death in 1950. He escaped from Soviet prison and fled to Canada, where he had become active in Estonian *emigré* groups. The film, "Creatures of Legend," depicted brutalities by the Communists in Estonia. 261 F. Supp. at 571; N.Y. Times, April 21, 1966, at 1, col. 1, 27, col. 3.

8. The answer asserted that the statements had been made "only upon privileged occasions to persons privileged to receive them, and each such statement was made without express or actual malice in furtherance of the defendant's legitimate duties, responsibilities and offices," and that the defendant was entitled to the privilege because he was acting "as an appropriate officer of the Estonian liberation movement." Raus also raised truth as a defense. 261 F. Supp. at 571.

9. Defendant alleged also that he could not have revealed his status as a CIA agent any earlier because he had been bound by a secrecy agreement which he had signed upon entering into employment with the Agency. For the text of the agreement, *see* 261 F. Supp. at 571 n.1.

10. 261 F. Supp. at 573.

11. *Id.*

12. The "state secrets privilege" is an evidentiary privilege which is claimed by the federal government when disclosure of information sought would endanger national security. Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). *See generally* 8 J. WIGMORE, EVIDENCE §§ 2378-79 (McNaughton rev. ed. 1961).

13. The claim by an intelligence agency of an evidentiary privilege to withhold state secrets has substantial basis in case law and statute. The Supreme Court recognized the state secrets privilege in 1876 when it was not even claimed by the government. In Totten v. United States, 92 U.S. 105 (1876), a claim was brought for sums due on a contract to do intelligence work for President Lincoln that had been entered into fifteen years previously. Although the Civil War was long since over when suit was brought, the

lawyers sought to question Raus at a hearing on the summary judgment motions, CIA lawyers repeatedly removed the defendant from the stand for consultation. Attempts to glean further data on Raus' employment at the time of the alleged tort were frustrated by repeated assertion of the state secrets privilege. In a final desperate effort to clear his name, Heine, acknowledging that if he were a Communist he would be guilty of failing to register under the Federal Foreign Agents Registration Act,[14] presented himself in Washington for arrest by the FBI. Neither that organization nor the CIA made any response.[15]

On December 8, 1966, the District Court of Maryland granted defendant Heine's motion for summary judgment, holding that under the principles articulated in *Barr v. Matteo* and recent cases in lower federal courts the defendant's remarks about Raus had been absolutely privileged. Judge Thomsen rejected the plaintiff's argument that the privilege extended only to officers who exercise discretionary functions and that subordinate officials such as Raus could not invoke its protection.[16] He noted that the absolute privilege had been extended to many lower executive officers, and he found further support in a Wigmore passage which asserted that "subordinate or ministerial official[s]" are exempt from liability if acting in obedience to "an order lawful upon its face."[17] Moreover, *Barr v. Matteo* had indicated that the basic policy behind the privilege—effective functioning of government—does not depend upon the level of an executive officer. The court concluded that this principle applies "with even greater force to an employee who is acting under orders and has a duty to carry them out."[18]

Plaintiff had also contended that agent Raus' actions had surpassed "the

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Supreme Court held that no action could be maintained on the contract. It had been entered into on the understanding that it would be kept secret; since the very bringing of suit would publicize the contract and hence breach it, courts could not uphold claims for unpaid salaries. This common law basis for the state secrets privilege is reinforced by the statutory provisions controlling CIA operations in the instant case. *See* note 24 *infra* and accompanying text.

The leading case on the role to be played by the court in determining the validity of a governmental claim of privilege is United States v. Reynolds, 345 U.S. 1 (1953). In that case, the Supreme Court established that the privilege could be claimed only by the Government through a formal claim by the head of the department having control over the material in issue. However, the court was to make the ultimate determination as to whether the privilege should be upheld. *See* note 23 *infra*.

14. 22 U.S.C. §§ 611-21 (1964), *as amended* (U.S.C.A. Supp. 1966).

15. N.Y. Times, April 28, 1966, at 29, col. 1; *id.*, April 29, 1966, at 19, col. 1; *id.*, May 14, 1966, at 2, col. 3.

16. The court first excused the tardy amendment of the defendant's answer; Heine had been bound to silence by a secrecy agreement with the CIA, the violation of which would have subjected him to criminal prosecution. 261 F. Supp. at 572 n.2. Paragraph 4 of the secrecy agreement spells out the criminal penalties. *See* 261 F. Supp. at 571 n.1.

17. 8 J. WIGMORE, EVIDENCE § 2368 (McNaughton rev. ed. 1961): "A subordinate or ministerial official—i.e., one who acts under the orders of a superior official—is absolutely exempt from liability if the harm by him is done solely in implicit obedience to an order lawful upon its face." *See* text accompanying notes 114-18 *infra*.

18. 261 F. Supp. at 576.

outer perimeter" of his line of duty—the test established in *Barr* to define the scope of the privilege. His argument was grounded upon statutory language which prohibits the CIA from exercising "internal-security functions."[19] Since the alleged defamation occurred in the United States, plaintiff submitted that the CIA had exceeded its authority by engaging in internal functions. The court refused to accept this characterization of the Agency's conduct in the instant case. It found affirmative support for Raus' act in the statutory provision making the Director of Central Intelligence responsible "for protecting intelligence sources and methods from unauthorized disclosure."[20] Noting that *emigré* groups naturally form a "valuable source of intelligence information," the court accepted Helms' explanation that the defendant's remarks had been designed "to protect the integrity of the Agency's foreign intelligence sources."[21]

In resisting defendant's motion for summary judgment based on the executive privilege, plaintiff alleged that the state secrets privilege unfairly prevented inquiry into the question of defendant's employment and the nature of his orders. Faced with the absolute privilege asserted by the defendant and the evidentiary privilege asserted by the Government, the plaintiff was in a "very difficult position."[22] Nevertheless, the court felt compelled to sustain the CIA's claim of evidentiary privilege. The tests prescribed in *United States v. Reynolds*[23] had been met; the agency had convinced the court that compulsion of further evidence might endanger national security. Moreover, the established state secrets privilege was reinforced by statutory provisions exempting the CIA from required "publication or disclosure of the organization, functions, [and] names . . . of personnel employed . . . ."[24] Finally, the defendant himself could not make further disclosures—such as the name of his superior officer—without violating the secrecy agreement signed with the CIA.[25] Since the plaintiff had not contradicted the Helms affidavits establishing the basis for defendant's claim of an absolute privilege, and since the court was bound to respect the evidentiary privileges asserted, summary judgment was appropriate.

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19. National Security Act of 1947, § 102(d)(3), 50 U.S.C. § 403(d)(3) (1964).
20. *Id.*
21. 261 F. Supp. at 576.
22. *Id.* at 578.
23. 345 U.S. 1, 10 (1953):
It may be possible [for the Government] to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.
24. Central Intelligence Agency Act of 1949, § 6, 50 U.S.C. § 403g (1964).
25. *See* 261 F. Supp. at 571 n.1.

II. The Doctrine of Absolute Privilege

A. *Barr v. Matteo and Its Predecessors*

Judges and legislators were accorded immunity from defamation suits in both England and the United States at an early date.[26] Then, in 1895, the English Court of Appeal permitted an executive officer to invoke a similar privilege.[27] One year later, the United States Supreme Court decided *Spalding v. Vilas*,[28] the leading case in this country on absolute privilege for cabinet officials.[29] The defendant in that case, the United States Postmaster General, had distributed a circular to local postmasters which reflected unfavorably on the plaintiff-attorney's integrity and practice. The Court held that the Postmaster could not be sued.[30] It reasoned that the important functions of a cabinet officer must be exercised unconstrained by the prospect of burdensome litigation and money judgments. Only an absolute privilege could offer sufficient protection; unless such officials could operate free from inquiry into their motives, the administration of public affairs would be severely hampered.[31] The Court defined the scope of the absolute privilege to include all conduct on the part of an official which has "more or less connection with the general matters committed by law to his control or supervision."[32] Between 1896 and 1959, the lower federal courts adopted the doctrine of absolute privilege[33] and extended it to include a large class of executive officers below cabinet rank.[34] In *Gregoire v. Biddle*,[35] a famous

26. *See* cases cited in Barr v. Matteo, 360 U.S. 564, 579-80 (1959) (Warren, C.J., dissenting).

27. *See* Chatterton v. Secretary of State, [1895] 2 Q.B. 189 (C.A.). The first executive officials to receive the benefit of the doctrine in England were military officers; the courts seemingly felt that the separate system of military courts made alternative sanctions available. The English version of the absolute privilege for executive officers has never been extended below cabinet officers; there has, however, been considerable confusion in English law between the absolute privilege doctrine in the law of defamation and the evidentiary privilege for the government to withhold official communications from exposure to courts. On the privilege in England, *see generally* Becht, *The Absolute Privilege of the Executive in Defamation*, 15 Vand. L. Rev. 1127, 1128-35 (1962).

28. 161 U.S. 483 (1896).

29. *See* Barr v. Matteo, 360 U.S. 564, 570 (1959); Becht, *supra* note 27, at 1136.

30. There is some question whether *Spalding* was a defamation case. *See* Mr. Justice Brennan's comment in his dissenting opinion to Barr v. Matteo, 360 U.S. 564, 587 n.3 (1959).

31. Becht, *supra* note 27, at 1137; Handler & Klein, *supra* note 4, at 48.

32. 161 U.S. at 498.

33. The history of the absolute privilege doctrine in the federal courts until 1959 has been extensively discussed elsewhere. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 579-82 (1959) (Warren, C.J., dissenting); W. Gellhorn & C. Byse, Administrative Law 360-68 (4th ed. 1960); Becht, *supra* note 27, at 1135-48; Comment, *Absolute Privilege as Applied to Investigators for Congressional Committees*, 63 Colum. L. Rev. 326, 328-37 (1963).

34. *See, e.g.*, Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952) (psychiatrist in United States government hospital); United States *ex rel.* Parravicino v. Brunswick, 69 F.2d 383 (D.C. Cir. 1934) (United States consul); de Arnaud v. Ainsworth, 24 App. D.C. 167 (1904), *error dismissed*, 199 U.S. 616 (1905) (chief of record and pension office of the War Department). This extension was not made without reservations, however. *See* Colpoys v. Gates, 118 F.2d 16 (D.C. Cir. 1941); Ogden v. Association of the United States Army, 177 F. Supp. 498, 502 (D.D.C. 1959) (dictum). *Compare* Kozlowski v. Ferrara, 117 F. Supp. 650 (S.D.N.Y. 1954), *with* Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938).

35. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

1949 Second Circuit decision, Judge Learned Hand reiterated the basic principle underlying the privilege: the need for effective functioning of government transcends any individual injury.[36] But it was *Barr v. Matteo*,[37] decided by the Supreme Court in 1959, that instilled new life into the doctrine and extensively articulated its scope and rationale. In response to congressional criticism of his department, defendant Barr—the Acting Director of the Office of Rent Stabilization—had issued a defamatory press release shifting the blame to the plaintiffs, employees of the agency. Justice Harlan's opinion, joined by three of the justices,[38] accorded an absolute privilege to the defendant.

Justice Harlan adopted Judge Hand's position that the absolute privilege was primarily "an expression of a policy designed to aid in the effective functioning of government."[39] To discount the danger of abuse by unscrupulous government officials, he cited experience with the doctrine in the judicial and legislative spheres[40] and asserted that "other sanctions" besides civil suits were available to deter such conduct.[41] Justice Black's concurring opinion, on the other hand, offered a novel rationale for the result. He focused upon the plaintiffs' positions as government employees and upon the defamatory statement's relevance to government operations. In his view, the absolute privilege was based on the first amendment's protection of the right to criticize government:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. . . . Such an informed understanding depends, of course, on the freedom

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36. It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

37. 360 U.S. 564 (1959). Howard v. Lyons, 360 U.S. 593 (1959), was decided on the same day as *Barr*. It said nothing new about the rationale for the absolute privilege. It only made clear that the doctrine's applicability to officers of the United States Government was a matter of federal, and not state, law. In addition, the Court settled the issue of the scope of the defendant's employment solely on the basis of affidavits submitted by defendant's superiors.

38. Only Justices Clark, Frankfurter, and Whittaker concurred with Justice Harlan. Justice Black concurred on different grounds discussed in the text accompanying note 42 *infra*. Of the dissenters, Chief Justice Warren and Justices Douglas and Brennan felt a qualified privilege was all that was necessary. Justice Stewart agreed with Harlan that an absolute privilege should apply but disagreed as to whether the defendant's acts came within his "scope of duty."

39. 360 U.S. at 572-73.

40. *Id.* at 576.

> people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.
>
> . . . Subjecting [the defendant] to libel suits for criticizing the way the Agency or its employees perform their duties would certainly act as a restraint upon him.[42]

The Harlan opinion discussed two issues concerning the application of the absolute privilege: the level of employee protected and the criteria defining whether the statement is within the scope of the defendant's duty. Several reasons were given for extending the privilege to lower-level executive officers:

> We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by lower federal courts . . . . The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
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> . . . It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.[43]

In considering the troublesome issue of scope of duty, the Court noted that press releases constituted a standard practice of the agency in question.[44] Moreover, it found that there had been a broad delegation of authority to the defendant. It concluded that Barr's public defense of agency practice—as well as of his own integrity—was "an appropriate exercise of . . . discretion."[45] Because the executive officer must be free to make use of his discretion, the privilege would encompass any action "within the outer perimeter of the line of duty."[46]

B. *Recent Developments*

Since 1959, courts have uniformly upheld claims of absolute privilege asserted by federal officials in defamation suits. Unfortunately, most of these decisions furnish little insight into the scope of the privilege. The few which discuss the level of officer protected by the privilege and the meaning of the term "scope of duty" fail to distill meaningful limitations from the broad

41. *Id.* Although Justice Harlan did not spell out what these "sanctions" were, he presumably had in mind the exposure of a government employee to public censure and to dismissal by his superior.
42. *Id.* at 577.
43. *Id.* at 572-74.
44. *Id.* at 574.
45. *Id.* at 575.
46. *Id.*

language of *Barr*.[47] Although the decisions seldom expressly denote when the privilege is justified and when it is not, they may be classified by reference to a number of factors which—consciously or unconsciously—seem to have influenced the courts to uphold a claim of privilege.

1. *The Availability of Alternative Remedies.* Absolute privilege has often been extended to executive officers for statements regarding a prospective judicial or quasi-judicial hearing. Even writers who criticize *Barr v. Matteo* concede that the privilege may be justifiable in such circumstances.[48] They recognize the paramount interest in complete freedom of judgment and communication in all phases of such proceedings. Furthermore, the subsequent hearing gives the potential plaintiff an opportunity to rehabilitate his reputation. It also serves to deter malicious action by executive officials, for if the plaintiff succeeds in vindicating himself, the officer may be subject to discipline by his superiors and loss of esteem among his colleagues.[49]

These considerations support the assertion of a privilege most strongly in the case of statements made after formal charges have been leveled against the plaintiffs.[50] However, the privilege has also been extended to statements made before the filing of formal charges. Usually, these have been cases in which subsequent judicial proceedings were likely, permitting the defamed individual an opportunity to redeem himself. Indeed, in every instance found, the preliminary, privileged remarks did lead to some proceedings in which the plaintiff had a voice. Of course, there is always a danger that the defamatory statements will not spur formal proceedings[51] or that the hearing will be unrelated to the initial allegations. However, the mere failure to

47. *But see* Poss v. Lieberman, 299 F.2d 358, 360-61 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 660 (2d Cir. 1962) (concurring opinion), *cert. denied*, 374 U.S. 827 (1963). Nonjudicial commentaries on *Barr* fare little better; they generally concentrate on repudiating the concept of an absolute privilege rather than limiting the doctrine. *See, e.g.*, Becht, *supra* note 27; Handler & Klein, *supra* note 4. *But see* Comment, *Absolute Privilege as Applied to Investigators for Congressional Committees*, *supra* note 33; 48 CORNELL L. Q. 199 (1962). This continuing animosity toward the rule has probably led some plaintiffs' lawyers astray; at least one case which might have presented valid grounds of distinction from *Barr* was instead argued unsuccessfully on the sole theory that *Barr* should be overruled. *See* Keiser v. Hartman, 339 F.2d 597 (3d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). The trial judge in that case felt there was a substantial issue as to whether the defendants were acting within the scope of their authority, but he could not rule on this issue since plaintiff's lawyer conceded that the scope of duty test had been met. *See* Appendix to Petitioner's Brief on Petition for Certiorari at 79a, Keiser v. Hartman, *supra*.

48. *See, e.g.*, Handler & Klein, *supra* note 4, at 56-59; Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 233 (1963).

49. Handler & Klein, *supra* note 4, at 57.

50. *See, e.g.*, Holmes v. Eddy, 341 F.2d 477 (4th Cir.), *cert. denied*, 382 U.S. 892 (1965); Waymire v. Deneve, 333 F.2d 149 (5th Cir. 1964); James v. Federal Deposit Ins. Corp., 231 F. Supp. 475 (W.D. La. 1964).

51. For example, Chavez v. Kelly, 364 F.2d 113 (10th Cir. 1966), gave an absolute privilege to a federal narcotics agent who—apparently on reliable information—told a customs officer that plaintiffs were planning to bring in narcotics illegally from Mexico. The officer arrested the plaintiffs and searched them, but they were freed without any formal charges being pressed against them.

prosecute should operate to vindicate the defamed plaintiff and to mitigate the harm to his reputation.

Sauber v. Gliedman[52] provides an example of preliminary statements which were held privileged despite their prematurity. The defendant in that case had been appointed as a Special Assistant Attorney General to investigate irregularities in an Internal Revenue Service office. Shortly after the appointment, he held a press conference and issued statements reflecting unfavorably on plaintiff, the director of the office under investigation. Although noting that the remarks were not made directly in the course of investigation, the court accorded an absolute privilege.[53] It stressed the likelihood of ensuing judicial proceedings in which the plaintiff could combat the charges:

> Any impropriety committed by a prosecuting attorney . . . may be remedied in the criminal proceeding against the accused. . . . Although the official may be immune to civil tort liability, he may nevertheless be subject to discipline and professional censure where warranted.[54]

Somewhat analogous are the cases in which the plaintiff can invoke remedies other than a defamation suit as a means of clearing his name. *Gamage v. Peal*[55] and *Preble v. Johnson*[56] each involved internal governmental communications rendered under circumstances which made hearings on the defendants' allegations likely.[57] In *Gamage*, the plaintiff sued three Air Force doctors and a civilian psychiatrist under contract with the Air Force, alleging both physical mistreatment and defamatory statements made in reports submitted to plaintiff's commanding officer. In support of the absolute privilege found by the court it should be remembered that the plaintiffs were protected by the separate judicial system which exists in the military.[58] The importance of this factor was clearly illustrated in *Preble*. There, the plaintiff himself had initiated a grievance proceeding concerning his job status in the Navy. During the course of the proceedings and accompanying investigations, the defendants made defamatory statements. The grievance proceedings presented the plaintiff with a ready opportunity to refute the various charges and to redeem his reputation.[59]

52. 283 F.2d 941 (7th Cir. 1960), *cert. denied*, 366 U.S. 906 (1961).

53. It is interesting to note that an absolute privilege had been denied by the District Court for Northern Illinois which heard argument before the Supreme Court decided *Barr v. Matteo*. After *Barr* was handed down, the district court reversed itself and entered summary judgment for the defendant. *Id.* at 943.

54. *Id.* at 944.

55. 217 F. Supp. 384 (N.D. Cal. 1962).

56. 275 F.2d 275 (10th Cir. 1960).

57. *See also* Inman v. Hirst, 213 F. Supp. 524 (D. Neb. 1962), where it appears that the statement in question was made directly to the plaintiff as part of an "official reprimand" by an Assistant Base Supply Officer at an Air Force base.

58. *Compare* note 27 *supra*.

59. Judicial review was also available to the plaintiff. Preble v. Johnson, 275 F.2d 275, 277 (10th Cir. 1960).

Alternative remedies also exist in most cases where the dismissal of a federal employee was provoked by the defamatory remarks. It is true that discharge may occur without a hearing;[60] and in some cases the specific charges are not revealed,[61] or the determination may be based upon private information furnished after the hearing.[62] However, as the Fifth Circuit intimated in *Wozencraft v. Captiva*,[63] the injured plaintiff can often invoke judicial aid through direct review of his discharge. Although it is true that such review is generally limited in scope,[64] its availability does offer some justification for bestowing an absolute privilege on officials who disparage coemployees.

Even where the injured plaintiff is not a federal employee, this justifying factor may be present. In *Ove Gustavsson Contracting Co. v. Floete*,[65] the plaintiff, a civilian contractor, lost his government contract as the result of unfavorable and allegedly false reports made by the defendants, government inspectors. Upholding the defendants' privilege, the Second Circuit noted that alternative remedies were available; plaintiff could appeal to the contracting agency, seek review pursuant to the Administrative Procedure Act,[66] or sue the Government in the Court of Claims. Further, since the reports had been distributed directly to defendants' superiors, it could be assumed that the Government would discipline the defendants for any capricious conduct.[67] Thus, although the rationale is seldom articulated, the availability of adjudicatory proceedings in which the plaintiff can rehabilitate his reputation often provides a justification for the erection of an absolute privilege.

2. *Confidentiality and Limited Publication.* The courts have demonstrated some predisposition toward extending an absolute privilege where the defamatory communication takes the form of an intra-departmental memorandum which is circulated only to other government agencies.[68] In such instances, two elements support the application of an absolute privilege. Because the communication is confidential—indeed, its publication to outside sources may often be violative of statutes or regulations[69]—the harm to the

60. *See* LeBurkien v. Notti, 365 F.2d 143 (7th Cir. 1966) (semble); Chafin v. Pratt, 358 F.2d 349, 351 n.7 (5th Cir.), *cert. denied*, 385 U.S. 878 (1966).
61. *See* Keiser v. Hartman, 339 F.2d 597 (3d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (factual situation given in Petitioner's Brief for Certiorari at 5).
62. *See* Camero v. Kostos, 253 F. Supp. 331, 334 (D.N.J. 1966).
63. 314 F.2d 288 (5th Cir. 1963).
64. *See generally* Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966).
65. 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).
66. *See* Administrative Procedure Act § 10, 5 U.S.C.A. §§ 701-06 (Special Pamph. 1966).
67. *See* 299 F.2d at 658-59.
68. In addition to the cases cited *infra*, *see* United States *ex rel.* Parravicino v. Brunswick, 69 F.2d 383 (D.C. Cir. 1934).
69. *See* Poss v. Lieberman, 299 F.2d 358, 361 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); Gaines v. Wren, 185 F. Supp. 774, 776 (N.D. Ga. 1960).

plaintiff is mitigated. And since a constant flow of information is invaluable to most government operations, such communications contribute directly to the effective functioning of government[70]—the foremost value promoted by the privilege. Occasionally, as in *Poss v. Lieberman*,[71] the judiciary has specifically recognized and articulated these mitigating factors. In that case, the defendant, a government claims representative, had made a defamatory statement about the plaintiff in a report accompanying a claim for Social Security benefits. The report, submitted to the defendant's superior, falsely stated that the plaintiff, an attorney, had been disbarred. In allowing an absolute privilege, the court commented:

> Plainly . . . there is better reason to hold the privilege absolute when applied to reports required or permitted to be made within an agency in the normal functioning of the agency's business, when these reports are required to be confidential as here and their disclosure would be a misdemeanor. . . . [The] need for freedom of communication within the agency overbalances the somewhat remote and limited probability of damage to the person libeled. . . .[72]

In some cases, the statements have been given only limited distribution, but did not form part of a scheme of interdepartmental communication. Thus, only one of the elements present in *Poss* is involved. In *Gaines v. Wren*,[73] for example, the Acting Industrial Relations Officer at an army depot was sued in defamation for revealing that the plaintiff had been discharged on insubordination charges.[74] The revelation had not been made on the initiative of the defendant, but rather in response to an inquiry from the plaintiff's prospective employer; moreover, the defendant had requested that the employer keep the information confidential. Although the defendant had specifically violated army regulations in making the reply,[75] the court accorded

70. When the plaintiff is himself a federal employee, there would also seem to be an element of reciprocity involved, since the plaintiff has the benefit of the same privilege which he can utilize in retaliation. This will not be possible, however, if the defendant's defamatory statement results in the plaintiff's discharge.

71. 299 F.2d 358 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

72. *Id.* at 361. The *Poss* rationale has since been adopted by the District Court of Alaska in a case regarding internal communications on an Air Force base. *See* Brown v. Coen, 209 F. Supp. 56 (D. Alas. 1962).

73. 185 F. Supp. 774 (N.D. Ga. 1960).

74. Plaintiff was subsequently exonerated of the insubordination charges. *Id.* at 775.

75. The court in *Gaines* might well have avoided the privilege and found that the defendant had acted beyond his authority. Specific regulations forbade the outside publication of charges before hearings. The court said that it was irrelevant that defendant had violated regulations and cited Preble v. Johnson, 275 F.2d 275, 278 (10th Cir. 1960), as authority. 185 F. Supp. at 777. *Preble*, discussed in the text accompanying note 59 *supra*, is easily distinguishable. First of all, it involved *intra-departmental* communications in the course of a grievance proceeding brought by the plaintiff. More importantly, in *Preble* the persons who demanded information from the defendants—and not the defendants themselves—had violated regulations. When a person makes statements in reply to questions that contravene proper rules, unless the illegality is patently obvious, there is little reason to hold him to knowledge of regulations with which he normally does not deal. It is another matter, however, when one violates rules regulating the very office which he holds; in that case, it would seem that an officer should be accountable for exceeding his scope of duty.

an absolute privilege and dismissed the suit. The result seems justifiable; for the defamatory communication was kept confidential, and the surrounding circumstances virtually excluded the possibility of malice.[76]

3. *Public Exposure of Governmental Activities.* The defamatory statements in *Barr v. Matteo* involved direct comment on governmental activities —in that instance, the defense of an agency operation. Justice Black's concurring opinion relied exclusively on the public interest in free criticism and discussion of government functions.[77] This same consideration has since been emphasized in *New York Times Co. v. Sullivan*[78] and its progeny. It is not surprising then that the absolute privilege has been readily applied in cases involving direct and indirect comment on government activities. *Steinberg v. O'Connor*[79] involved the direct conveyance to the public of information relating to government operations. The plaintiff alleged that he had been defamed by the Administrator of the State Department's Bureau of Security and Consular Affairs in a speech to VFW representatives denouncing Communism and the policy of issuing passports to known Communists.[80] The court applied *Barr v. Matteo* to hold the occasion privileged.[81] Since the defamatory statements were not confidential, and since there was only a negligible prospect of subsequent judicial proceedings, the nature of the remarks—involving dissemination of information about the Government—must assume considerable importance in justifying the result. Indeed, without the policy favoring open criticism of government, it would be difficult to consider the public speech to be within the defendant's scope of duty.

Denman v. White,[82] a recent First Circuit decision, presented a factual situation resembling *Barr v. Matteo* and could therefore be supported under the first amendment rationale articulated in Justice Black's concurring opinion in *Barr*. In *Denman*, the plaintiff, an engineer, had charged in statements

76. It is questionable whether the statements themselves were even defamatory since the letter said only that the plaintiff had been *charged* with certain offenses and mentioned that a hearing on the charges was pending. *See* 185 F. Supp. at 776. In addition, the defendant requested that the material in the letter be kept confidential, thus almost negating any possibility that he acted with malice.

77. *See* 360 U.S. at 576-78.

78. 376 U.S. 254 (1964). The parallels between *Sullivan* and *Barr* were specifically mentioned in Garrison v. Louisiana, 379 U.S. 64, 74 (1964). *But see* Rosenblatt v. Baer, 383 U.S. 75, 84 n.10 (1966) (dictum), *followed in* Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L.W. 3082 (U.S. Sept. 6, 1966) (No. 522).

79. 200 F. Supp. 737 (D. Conn. 1961).

80. From the opinion it is hard to see how the speech to the VFW was defamatory. The speech only described the activities of Communists, while the defamation alleged by plaintiff was that he had been called a Communist. The actual charge that plaintiff was a Communist was made subsequently in Senate hearings.

81. The court disregarded the independent ground of privilege: testimony before legislative committees. Although no case on point appears to have arisen in the federal courts, a fair number of state courts have held that an absolute privilege attaches to one who testifies in a legislative proceeding, regardless of his position. *See* W. PROSSER, TORTS § 109, at 801 (3d ed. 1964). In addition, the chairman of the committee requested that the defendant come to the hearing and make his statements. 200 F. Supp. at 739.

82. 316 F.2d 524 (1st Cir. 1963).

published in a local newspaper that the Air Force's negligence had caused the disastrous collapse of a radar tower.[83] Asked to comment on these charges, the defendant, commander of a local Air Force base, called plaintiff's statements "irresponsible" and "distortions of the fact."[84] These replies were also published in the local paper. Since the defendant had been acting within the authority conferred by regulations governing an Air Force information program, an absolute privilege was accorded. Unlike the statements in *Barr*, the defamatory remarks here had been directed toward a private citizen. But they did represent a response to overt criticism of government operations—the same type of activity approved in *Barr*. Moreover, there is good reason to believe that plaintiff would be regarded as a "public official" within the meaning of the *Sullivan* decision.[85] In that event, defendant would at least be entitled to the privilege established in that case.

4. *The Privilege for Tortious Conduct Other than Defamation.* The judicial uniformity in allowing an absolute privilege against liability for defamation is not mirrored in cases dealing with other tortious conduct. Some courts have embraced the *Barr v. Matteo* rationale, even though the protected activity was not speech and the injury was not merely loss of reputation. The Fifth Circuit, in *Norton v. McShane*,[86] accorded an immunity to United States marshals who allegedly beat and detained the plaintiffs for extended periods after unlawfully arresting them. Accepting the affidavit of the United States Attorney General who claimed that the defendants had been acting within the scope of their employment, the court reasoned that such officers must be free to perform law enforcement functions without fear of suit.[87] The court refused to make an exception to the doctrine of absolute privilege or to evolve special rules based on the nature of the injuries.[88]

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83. The Air Force radar tower had collapsed in the Atlantic Ocean, killing twenty-eight people.

84. 316 F.2d at 525.

85. *See, e.g.*, Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L.W. 3082 (U.S. Sept. 6, 1966) (No. 522); *cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967).

86. 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *accord*, United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965). *Norton* and *Faneca* arose out of the 1962 racial disturbances connected with James Meredith's enrollment at the University of Mississippi.

87. 332 F.2d at 862. The result in *Norton* is shocking. Under Monroe v. Pape, 365 U.S. 167 (1961), municipal police officers acting under color of *state* law are subject to suit for violation of fourteenth amendment rights even when they act in good faith. The Fifth Circuit itself, in a subsequent case, commented on the anomaly resulting from its decision in *Norton*—*i.e.*, that a law enforcement official is subject to different standards of liability depending on whether his employer is the state or the federal government—but made no attempt to resolve the inconsistency. See Pierson v. Ray, 352 F.2d 213, 218 (5th Cir. 1965), *rev'd in part on other grounds*, 87 S. Ct. 1213 (1967).

88. Judge Gewin of the Fifth Circuit, dissenting in *Norton*, relied heavily on the extraordinary nature of the injury in that case as opposed to the defamation in *Barr*:

> In Barr v. Matteo, the defendant who was head of a government agency was being sued for defamation by other government employees arising out of a dispute over who was at fault for failure of the agency to meet certain congressional criticisms. . . . [T]his suit is not founded on any such comparatively minor complaint. . . .

Other sources have refused to countenance the *Norton* court's indiscriminate extension of the *Barr* rule to tortious conduct inflicting harm beyond injured reputation. The First Circuit decision in *Kelley v. Dunne*[89] explicitly rejected *Norton* and refused to allow an absolute privilege for a government postal inspector's trespass and conversion. The defendant, after falsely alleging possession of a search warrant, had entered the plaintiff's home and seized money. In denying a privilege, the court stressed that the public interest in permitting lower postal officials to make unauthorized searches and seizures was minimal.[90] Similarly, in *Hughes v. Johnson*,[91] the Ninth Circuit held that federal game wardens could be held liable for unlawful conversion of property upon a sufficient showing that they had committed an unauthorized search and seizure.

Courts should, it is submitted, decline to amplify the scope of the absolute privilege beyond defamation. Police brutality and unauthorized search and seizure cases contain none of the elements justifying the privilege in *Barr* and succeeding decisions involving defamation. While harm to reputation can be adequately repaired by judicial or quasi-judicial proceedings, physical or material harm is much more difficult to undo. Moreover, it is impossible to keep such injuries "confidential," and the conduct in question involves no public dissemination of information on government activities.

III. Absolute Privilege and the CIA Agent

Many scholars have condemned the entire concept of an absolute privilege for executive officers.[92] They feel that concern about litigation and possible liability has negligible impact on the conduct of government officials; that is, the spectre of defamation suits does not stifle expression by such officials.[93] It is true that the correlation between potential liability and per-

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> . . . [N]o officer can *unlawfully, willfully, maliciously* and *without probable cause* . . . deny a citizen his *constitutional rights* and then claim that the acts involved ". . . have more or less connection with the general matters committed by law to the officer's control . . . ."

332 F.2d at 866 (emphasis in original).

89. 344 F.2d 129 (1st Cir. 1965).

90. *Id.* at 133. The court also commented on the "scope of duty" test laid down in *Barr*:

> While no act can ever be judged in vacuo, but only with some measure of reference to external circumstances, some actions require very little showing in order to appear at least prima facie justified, while others need elaborate support. Paradoxically, it would seem that it is in the latter situation that there is less need for the immunity doctrine. In the latter case, where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances and there is more reason for him to have to expect to be prepared to justify his conduct. This is far less of a burden than if he had to be constantly on guard in every routine case of customary activity.

Id. at 132-33.

91. 305 F.2d 67 (9th Cir. 1962).

92. *See, e.g.*, Becht, *The Absolute Privilege of the Executive in Defamation*, 15 Vand. L. Rev. 1127, 1166-67 (1962).

93. The explanation [for the doctrine] is said to be that it is "important that officials of government be free to exercise their duties unembarrassed by the fear

formance has never been demonstrated. But this is not surprising, for the effects of any deterrent are difficult to measure, and the existence of an absolute privilege precludes an accurate estimation of performance under any other standard.[94] In view of the inconclusive data, judicial abrogation of the absolute privilege is highly unlikely. Indeed, the course of decision in defamation cases after *Barr* has uniformly extended the scope of the privilege. And the *New York Times Co. v. Sullivan*[95] doctrine, based on similar notions of potential liability as a damper of expression, probably reinforces the foundation of the privilege. The object then must be to discern the limits of the privilege—a task which the court in the instant case neglected when it applied the *Barr* doctrine to a CIA agent. The court noted the recent cases extending *Barr* to a variety of federal officials and assumed that an intelligence agent could come within the expanded doctrine. Yet, the unique situation of defamation by a secret agent does not permit automatic extension of an absolute privilege under the *Barr* rationale.

A. *Applicability of the Privilege*

Insofar as *Heine v. Raus* is typical of the types of suits in which a CIA secret agent might assert an absolute privilege, extension of the privilege to such actions would appear unwarranted. None of the justifying factors present in the recent cases can be discerned in the instant case. Thus, Heine could not secure an alternative judicial or quasi-judicial proceeding in which to repudiate the charges levelled against him. This inability to secure a hearing was amply demonstrated by the plaintiff's abortive efforts to induce the FBI to arrest him during the spring of 1966.[96] The CIA, which is not a law enforcement agency,[97] has no authority to press its claims against the plaintiff in a court of law. Furthermore, it could not be claimed that the defamatory statements were intra-departmental or even confidential in scope. At the very least, defendant intended to warn all members of the Legion of Estonian Liberation of plaintiff's alleged Communist ties.[98] Finally, the defendant's remarks cannot be regarded as contributing to public knowledge of govern-

of damage suits . . . ." This, I fear is a gossamer web self-spun without a scintilla of support to which one can point.
Barr v. Matteo, 360 U.S. 564, 589-90 (1959) (Brennan, J., dissenting).

94. Becht, *supra* note 92, at 1166, 1169-70.

95. 376 U.S. 254 (1964).

96. *See* text accompanying notes 14-15 *supra*.

97. "[T]he [Central Intelligence] Agency shall have no police, subpena, [or] law-enforcement powers. . . ." National Security Act of 1947, § 102(d)(3), 50 U.S.C. § 403 (d)(3) (1964).

98. Even if the statements could be considered confidential, it seems significant that the only two cases which upheld the absolute privilege for confidential statements not made within an agency involved statements solicited by the listener or reader. *See* Brownfield v. Landon, 307 F.2d 389 (D.C. Cir.), *cert. denied*, 371 U.S. 924 (1962); Gaines v. Wren, 185 F. Supp. 774 (N.D. Ga. 1960), discussed in notes 73-76 *supra* and accompanying text. Indeed, the court in *Brownfield* relied heavily on that factor. *See* 307 F.2d at 393. It appears that the statements in the instant case were unsolicited.

ment activities. The recipients of the allegations had no knowledge of CIA involvement in the affair. While Raus' comments might have represented a subject of interest for his audience, the necessary nexus with governmental operations—whether through praise, criticism, or exposure—was not present.[99]

The eligibility of the secret agent for the benefits of an absolute privilege may be questioned on a second ground. Every previous case according an absolute privilege to an executive officer has involved a statement which the observer or listener could recognize as spoken by a government employee in his official capacity. CIA operations, on the other hand, are shrouded in extraordinary secrecy.

Secrecy creates special hardships for the plaintiff. As in the instant case, the private citizen, who is unaware of the agent's real identity, may launch suit and incur substantial expenses for counsel and trial preparation before being met by a virtually indefeasible privilege. Once the absolute executive privilege is invoked, the defendant can apparently employ the state secrets privilege to prevent inquiry into the facts of employment and thus make his position unassailable.[100] The plaintiff is left not only with a tarnished reputation, but also with considerable expenses incurred in an unavailing effort to redeem himself in court.[101]

The CIA undercover agent in *Heine* sought to invoke a privilege common to governmental agencies without incurring the normal concomitants of such protection. Government operations are normally open to public scrutiny. When a public official speaks, he is recognized as a government officer and he and his department are subject to public censure for improper conduct.[102] Because the agencies are sensitive to such criticism, discipline from superiors and disapproval from colleagues can act as a sanction for defamatory comments of most officials. The CIA agent, on the other hand, is virtually immune from the normal pressures which accompany government office. The secrecy in which he operates insulates him from public exposure and public censure. Even when his identity becomes known, as when he seeks to invoke a special privilege, the normal pressures are not likely to operate. The entire Agency operates in such secrecy that internal sanctions are improbable: the persons actually responsible for the statements cannot be dis-

99. This is not to deny that the defendant might assert a *qualified* privilege under *New York Times Co. v. Sullivan*. Plaintiff might be a public figure within the meaning of the rule of that case. *See* note 85 *supra* and accompanying text.

100. Furthermore, the defendant is aided by the statutory protection given to the CIA's files. *See* text accompanying note 24 *supra*.

101. This hardship might be overcome through the court's power, under Fed. R. Civ. P. 54(d), to impose costs on the defendant. Thus, a court might permit a secret agent to assert the absolute privilege, but—in view of the unfairness to the plaintiff—might require the defendant to pay the plaintiff's costs. Otherwise, the plaintiff's only hope for having his reputation vindicated is the CIA's propensity for diminishing its own credibility. *See, e.g.*, Stern, *NSA and the CIA*, RAMPARTS, March 1967, at 29.

102. *Compare* note 41 *supra* and accompanying text.

cerned and public pressure is therefore dissipated. Since the agent has been operating on orders from higher echelons, discipline from his superiors cannot be expected.[103]

Despite the difficulties created by secrecy, an absolute privilege will no doubt be accorded to some members of the CIA. Courts have been sensitive to the risk that executive officials will be hampered in the vigorous prosecution of their duties by the fear of civil liability. And the interest in assuring executive freedom of action is overpowering in the case of high level CIA officials, directing operations concerning the nation's security. This rationale permits the extension of an absolute privilege for some, but not all, CIA personnel.

B. *Level of Employees Protected*

The most sensible way to define the class which may claim the privilege is by reference to the likelihood that the official's conduct would be influenced by the threat of liability. Thus, Professor Davis has asserted that the absolute privilege "probably ends where discretionary functions end. . . ."[104] This test, which finds support in other authority as well,[105] is basically sound; when an employee exercises no judgment in performing his functions, the presence or absence of a privilege should have no significant deterrent effect. But it is perhaps too broad; for even the lowest tier of any bureaucracy exercises some judgment in the performance of its duties.[106] Hence, the principle has almost infinite application.[107] Somewhat more useful is a second formulation which would limit the privilege to those officials exercising "policy-making functions."[108] Under this standard, the typical intelligence agent would almost

103. The ultimate implications of according an absolute privilege to intelligence agents are sobering. Impunity in villifying citizens is a great enough danger when surrounded by the normal safeguards which deter misconduct by public officials. Placed in the hands of a secret organization, one purpose of which is to temper criticism of the Government, such impunity raises the possibility of stifled public criticism of government operations. As one commentator has noted:

> The [*Barr* and *Howard v. Lyons*] decisions were based upon an assumption that the Government would always act with honorable motives and a sense of fair play. They reckoned without the C.I.A.'s claim to operate outside the conventional rules.

Graham, *The Spy Story that Came into Court*, N.Y. Times, May 1, 1966, § 4, at 6, col. 1.

104. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.04, at 133 (Supp. 1965).

105. *See, e.g.*, Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963).

106. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 322-23 (1959).

107. Because of the greater freedom of action and larger policy-determining powers entrusted to higher ranking executive officials, the defense to suits based on an alleged misuse of discretion was first afforded to heads of departments. The rationale of the immunity, however, is equally applicable to all subordinate officials who are permitted to exercise some degree of freedom in the performance of their duties.

Developments in the Law—Remedies Against the United States and Its Officials, 70 HARV. L. REV. 827, 835 (1957) (footnote omitted).

108. *See, e.g.*, Poss v. Lieberman, 299 F.2d 358, 360 (2d Cir.) (dictum), *cert. denied*, 370 U.S. 944 (1962); Comment, *Absolute Privilege as Applied to Investigators for Congressional Committees*, 63 COLUM. L. REV. 326, 333, 343-44 (1963).

certainly fail to qualify for an absolute privilege. Thus, defendant Raus' position apparently involved only implementation of policy; in all matters connected with the instant case he acted pursuant to orders and in no wise could be considered to have exercised policy-making functions.

In contrast to these verbal formulae, some authorities have proposed a case-by-case, balancing approach to determine the scope of the privilege.[109] Since the privilege is grounded on considerations of public policy, these sources declare that each case should hinge on the relative weight of the competing interests: effective functioning of government and integrity of reputation.[110] If it is important that the particular official be free to speak or to perform any other act, then the public interest in unfettered government action will support an absolute privilege.[111] The mere presence of discretion would not be determinative.

Unfortunately, this balancing test is not only unfeasible, but also defeats the entire purpose of an absolute privilege. Because of the infinite variety of factors which determine the importance of various communications, evolution of a consistent doctrine is difficult. Absence of predictability vitiates the privilege. An absolute privilege is designed to reassure officials that they can speak without fear of suits; if officers cannot be confident in advance that their communications will be protected, the privilege does not fulfil its function. Frequently, even the courts cannot foretell the likely results of a balancing process, and it is implausible that a particular official can predict the outcome of future adjudication.

C. *Privilege by Attribution from a Superior*

Even though Raus probably could not assert an absolute privilege in his own right because of his low rank in the CIA hierarchy, it may well be that the officer who ordered him to make the statement would be entitled to the privilege. Should Raus, who acted pursuant to command, be entitled to invoke the protection which the law grants to his superior?

Although there is authority, most of it ancient, which indicates that a subordinate official will be held liable for tortious conduct in such circum-

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The Hatch Act § 9A, 5 U.S.C.A. § 7324(d)(3) (Special Pamph. 1966), incorporates a "policy-making" test to define executive officers exempt from its application. The D.C. Circuit Court of Appeals in 1941 suggested that this provision might form an appropriate guideline for determining executive officers covered by the absolute privilege. *See* Colpoys v. Gates, 118 F.2d 16, 17 (D.C. Cir. 1941) (dictum). However, the Hatch Act stipulates that the policy-making official to whom it refers must be "appointed by the President"; this test seems much more restrictive than the standards outlined in *Barr v. Matteo.* Without the Presidential appointee limitation, the policy-making test could prove helpful in defining the reach of the privilege—at least when used in combination with the recurrent factors noticed by the federal courts in upholding the privilege.

109. *See* Kelley v. Dunne, 344 F.2d 129, 133 (1st Cir. 1965); Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied,* 374 U.S. 827 (1963).

110. *See* 58 MICH. L. REV. 295, 297 (1959).

111. *See* Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied,* 374 U.S. 827 (1963).

stances,[112] this result is harsh. The chief concern of a subordinate officer is in retaining his job; hence the natural and overwhelming impulse is for him to obey any directive short of one to engage in outright criminal conduct.[113]

A more reasonable rule has been suggested: the subordinate officer should be permitted to avail himself of any absolute privilege extended to his superior.[114] That is, if the commanding officer would be absolutely privileged to make the statements in question, the subordinate would not be liable for making the same statements pursuant to instructions. Under this formulation, the relevant inquiry becomes the authority of the commanding officer to issue the order in question and his entitlement to an absolute privilege. The subordinate employee bears the risk that his superior was in fact unauthorized to issue his mandate. Because of the difficulties which the CIA's secretive habits pose for the plaintiff, the subordinate should also bear the burden of proving that his superior was privileged. Nevertheless, this rule at least offers some protection to the lower echelon officer who is merely implementing orders.

There is some support for an even more liberal rule which would accord immunity to subordinate officials if they had a reasonable belief in their superior's authority to issue the order in question.[115] Presumably, liability would be shifted to the superior if he had no absolute privilege, and if the subordinate could show a reasonable belief in the superior's authority to issue the order.[116] Another possible prescription would be the *New York Times Co. v. Sullivan* test requiring dismissal unless knowing falsehood or reckless disregard of the truth is shown. It is submitted, however, that both formulae are unsatisfactory when applied to CIA agents. The intelligence agent is simply not in a position to determine the authority of a superior officer or to question that authority. Nor can he generally assess the credibility of reports upon which the ordered statements are grounded. The reports transmitted from the Agency to the agent are probably devoid of the detail

112. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (dictum); Gray, *supra* note 106, at 322 n.116.

113. This apparent unfairness has been deemed more theoretical than real by at least one commentator, who feels that the lower officer will usually be reimbursed by either his superior or the Government. *See* Gray, *supra* note 106, at 322 n.116. However, this explanation does not justify the inconvenience to the subordinate or the illogic of the rule.

114. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 345 (1958); *Developments in the Law—Remedies Against the United States and Its Officials*, *supra* note 107, at 836.

115. *See* Gray, *supra* note 106, at 317-18 (court officers acting pursuant to judicial mandate); Comment, *Absolute Privilege As Applied to Investigators for Congressional Committees*, *supra* note 108, at 334. This is presumably the position taken by Wigmore in the treatise passage relied upon by the court in the instant case. *See* note 17 *supra* and accompanying text.

116. To some extent, this standard corresponds to the "due-care privilege" which Professors Handler and Klein have advanced to supplant the absolute privilege for executive officials. *See* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 67-76 (1960). Under a due care standard, officials avoid liability for defamation if they can demonstrate reasonable grounds for believing the statements made; actual malice, in the sense of evil motives, would not be a ground for liability.

needed to determine their truth. In the case of a CIA agent, a further reason exists for disallowing a due care privilege, or a reasonable belief in authority test, and for holding the agent liable whenever upper-echelon officials would not be absolutely privileged to issue the statements which the agent had made pursuant to orders. If the agent can avoid liability by establishing a reasonable belief in the truth of the statements made, or in his superior's authority to issue the orders, the plaintiff may be effectively foreclosed from all redress even though none of the officials involved is entitled to an absolute privilege. Since the name of the officer who issued the order may be exempt from disclosure,[117] there may be no possibility of shifting liability to the person actually responsible—a CIA executive.[118]

D. *Scope of Authority: CIA Power to Expose Alleged Communists*

A CIA agent acting pursuant to orders from an executive who is absolutely privileged should be able to invoke that immunity. But in order to establish the superior's absolute privilege, the agent should be required to demonstrate that the action was within the superior's authority and that of the Agency as a whole.[119] Where the CIA is involved, this inquiry is hampered by the all-encompassing blanket of secrecy.[120] Nevertheless, some tentative conclusions may be reached as to the scope of the Agency's authority in the instant case by reference to the statutes defining the CIA's purposes and powers.

The CIA—an organization formed to coordinate the various foreign

117. *See* text accompanying note 24 *supra*. As the instant case aptly demonstrates, plaintiffs will have a difficult task in pinpointing the executive responsible for the order to discredit the plaintiff. Heine has now turned to the Fourth Circuit Court of Appeals in an effort to get the CIA to reveal the name of the officer responsible for the orders in the instant case. N.Y. Times, March 28, 1967, at 28, col. 7.

118. The Agency may well assume its ultimate responsibility and reimburse the defendant agent if he is held liable. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 253 (1965). *But see* Davis, *"Judicial Control of Administrative Action": A Review*, 66 Colum. L. Rev. 635, 646-47 (1966). State liability seems unquestionably to be the most desirable answer to the whole problem of liability for tortious acts by government officials. *See* Becht, *supra* note 92, at 1171; Jaffe, *supra* note 105, at 235.

119. It should be noted that, at a hearing on May 13, 1966, the General Counsel of the CIA offered to submit to the court in the instant case two paragraphs from a document classified as "secret." The CIA requested that the document and the paragraphs be inspected *in camera* by the court and that they be made available to the attorneys for plaintiff and defendant for inspection, but not for copying; additionally, the attorneys were not to disclose what they had seen. Plaintiff's attorneys refused to examine the excerpts under these conditions, stating that they would not look at anything which could not be communicated to their client. The court did examine the papers but said in its opinion that it "ha[d] not considered the classified excerpts in reaching its decision. . . ." 261 F. Supp. at 576 n.4.

120. A factual situation such as that in the instant case might well recur with an FBI agent as the defendant. The process of discovery in such a case would be facilitated, since FBI files, unlike those of the CIA, do not come within the state secrets privilege. *See* Comment, *Disclosure of Prior Statements of a Government Witness in Federal Criminal Prosecutions*, 106 U. PA. L. REV. 110, 114 n.29 (1957). Such files would instead be protected only by a statutory executive privilege, which is subject to closer scrutiny by the courts.

intelligence activities of the United States[121]—would not ordinarily be expected to aid in exposing domestic subversive activities. In granting summary judgment for the defendant, the court in *Heine v. Raus* found authority in the National Security Act of 1947[122] for Raus' comments purporting to expose plaintiff as a Communist. Yet examination of that provision, in conjunction with the facts presented in the CIA affidavits, leaves it far from clear that these statements comported with the CIA's scope of authority.

Section 102(d)(3) of the National Security Act obligates the Director of Central Intelligence to protect "intelligence sources and methods from unauthorized disclosure."[123] If it were asserted that plaintiff was a Communist agent trying to infiltrate the Estonian Legion, and that the Legion was a source of foreign intelligence information, Raus' discrediting of the plaintiff could be construed as coming within section 102(d)(3), for a Communist agent might well seek to expose the CIA's connections with the *emigré* group.[124] But the affidavits submitted do not establish any such insidious fact pattern. In the first place, they state that the defendant Raus, rather than the Legion, had been a source of intelligence data.[125] Moreover, there is no indication that plaintiff Heine was seeking to subvert or even to join the *emigré* group. Defendant's first answer alleged instead that the defamatory statements were intended merely to prevent "cooperation of the Legion and its branches during the plaintiff's tours of the United States."[126]

None of the affidavits established that the Director of Central Intelligence had approved the operation in question or had delegated that authority to the individual responsible. Yet the statute is specific in attaching responsibility to the Director rather than the Agency as a whole. A separate provision does permit the Deputy Director to exercise the Director's powers during the latter's "absence or disability,"[127] but Helms' affidavit carefully avoids mention of who authorized Raus' venture or under what circumstances approval was given. These various doubts combine to render suspect the CIA's authority, under section 102(d)(3), to disseminate information about plaintiff Heine. Certainly, singly or in combination they suffice to make summary judgment inappropriate on the issue of scope of authority.

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121. *See* National Security Act of 1947, §§ 102(d), (e), 50 U.S.C. §§ 403(d), (e) (1964).

122. § 102(d)(3), 50 U.S.C. § 403(d)(3) (1964).

123. *Id.*

124. However, the statutory provision in question was apparently intended only to permit the Director of Central Intelligence to withhold information from the public. There is no indication that it was designed to permit the CIA to act with impunity in warning members of its front groups about possible foreign agents. CIA Regulation HR 10-20(b), promulgated pursuant to the statute, supports this interpretation. *See* Joint Appendix at 183, Heine v. Raus, *appeal docketed*, No. 11,195, 4th Cir., March 27, 1967. *See also* A. DULLES, THE CRAFT OF INTELLIGENCE 194, 245 (1963).

125. 261 F. Supp. at 573.

126. *Id.* at 571.

127. National Security Act of 1947, § 102(a), 50 U.S.C. § 403(a) (1964).